APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED JANUARY 12, 2006

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 01-2678

CORWIN GAINES,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Lynch, Lipez and Howard
Circuit Judges.

JUDGMENT

Entered: January 12, 2006

Petitioner Corwin Gaines appeals from the judgment of the district court denying his motion filed under 28 U.S.C. § 2255, and the government has filed a motion for summary disposition. We have carefully reviewed petitioner's brief, the government's motion, and the record and agree with the government that summary disposition is appropriate in this case.

First, neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000), nor *Blakely v. Washington*, 542 U.S. 296 (2004), are retroactively applicable to cases on collateral review. *See Sepulveda v. United States*, 330 F.3d 55, 57, 59-63 (1st Cir. 2003) (holding that *Apprendi* cannot be applied retroactively to cases on collateral review); *Cirilo-Munoz v. United States*, 404 F.3d 527, 532-33 (1st Cir. 2005) (holding the same regarding *Blakely*).

Second, the district court was not required to provide discovery or an evidentiary hearing on petitioner's ineffective assistance of counsel claims, neither of which, we note, was supported by *any* factual allegations. As for discovery, it is plain that petitioner essentially wished to go on a fishing expedition in the hopes that he might net some facts to support his claims. Such a speculative hope, however, is an insufficient basis on which to premise discovery. *See DeVincent v. United States*, 632 F.2d 145, 146 (1st Cir. 1980) (where the petitioner was "merely speculating" and had no proof that the full grand jury had not voted on the actual terms of the indictment against him, the district court was not required to permit a "fishing expedition" so that such a claim possibly could be established). For the same reasons, the district court also was not required to hold an evidentiary hearing on these conclusory claims. *See David v. United States*, 134 F.3d 470, 477-78 (1st Cir. 1998) (affirming the denial of an evidentiary hearing where the § 2255 claim "is inadequate on its face, or . . . the movant's allegations need not be accepted as true because they state conclusions instead of facts") (internal quotation marks and citations omitted).

Appendix A

The judgment of the district court is *summarily affirmed*. *See* Local Rule 27(c). All pending motions are *denied* as moot.

By the Court:
Richard Cushing Donovan, Clerk.

By: MARGARET CARTER
Chief Deputy Clerk.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 30, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-CV-10446-GAO

CORWIN GAINES,

Petitioner

v.

UNITED STATES,

Respondent.

ORDER GRANTING APPLICATION FOR CERTIFICATE OF APPEALABILITY
September 30, 2002

O'TOOLE, D.J.

This Court denied the petitioner's motion under 28 U.S.C. § 2255 to vacate his sentence, and he now applies for a certificate of appealability as required by 28 U.S.C. § 2253(c) and Fed.R.App.P. 22(b). For the following reasons, the application is GRANTED.

The application enumerates fifteen issues that the petitioner seeks to present on appeal from the denial of the

§ 2255 motion, but the issues really fall into three groups: claims of ineffective assistance by the petitioner's trial counsel, claims seeking to take advantage of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and claims regarding procedural rulings concerning the disposition of his § 2255 motion.

On direct appeal, *see United States v. Gaines*, 170 F.3d 72 (1st Cir. 1999), the petitioner argued that the trial court had committed error in several different evidentiary rulings. His judgment of conviction was affirmed. In his § 2255 motion, he recast those arguments to argue that his trial counsel had rendered constitutionally ineffective assistance by failing to make a presentation sufficient to forestall the trial court's rulings on the same issues presented in the direct appeal. He also claimed ineffective assistance of trial counsel in failing to advise him properly concerning an alleged plea offer from the government. In denying his § 2255 motion, this Court rules that, because he had not presented the ineffective assistance claims on direct appeal when he was represented by new counsel, he was procedurally foreclosed from raising them for the first time in a motion under § 2255.

This Court also rejected the petitioner's *Apprendi* claims, ruling that (1) the *Apprendi* rule has not been made retroactive by the Supreme Court and (2) even if it applied, it was not violated by the imposition of consecutive sentences under § 5G1.2(d) of the United States Sentencing Guidelines.

Finally, this Court denied his motion for discovery and for an evidentiary hearing in aid of his § 2255 motion.

Appendix B

While some circuits have held that claims of ineffective assistance of trial counsel can be procedurally defaulted by failure to present them in a direct appeal when the petition was represented by new counsel on appeal and when the alleged errors are discernible in the trial record, *see Billy-Eko v. United States*, 8 F.3d 111, 115-116 (2d Cir.1993), the question has not been definitively answered in this circuit. Accordingly, the question is debatable by jurists of reason, and it is appropriate for appellate consideration. The certificate is GRANTED as to that issue, as well as to the related issues whether discovery and an evidentiary hearing ought to have been allowed.

In an unpublished opinion, *Saccoccia v. United States*, 42 Fed.Appx. 476, 482, 2002 WL 1734169 at **4 (1st Cir. 2002), a panel of the Court of Appeals resolved the *Apprendi* issue presented against the petitioner's position. If this had been a precedential decision, there would be no need for further appellate consideration of the question. Since precedential status was not given to the *Saccoccia* ruling, however, the matter must still be considered to be an open question in this circuit. Accordingly, the certificate of appealability is GRANTED as to this issue as well.

It is SO ORDERED.

September 30, 2002	s/ [illegible]
Date	District Judge